In the Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-1037

CHARLES COLES DIGGS, ET AL., PETITIONERS

v.

GEORGE P. SHULTZ, SECRETARY OF THE TREASURY, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioners commenced the present suit in the United States District Court for the District of Columbia, challenging as "null and void" the so-called Byrd Amendment[1] to the extent it authorized the importation of "strategic and critical" materials from Southern Rhodesia, and seeking to enjoin the importation from that country of such materials, including metallurgical chromite, into the United States.[2] The district court dismissed the suit on

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[1]Section 503 of the Military Procurement Act of 1971, 85 Stat. 427. The text of the Byrd Amendment is set out on p. 3, *infra*.

[2]The complaint also asked for an order requiring the federal government to impound all Rhodesian metallurgical chromite already imported into this country by private parties pursuant to the Byrd Amendment.

grounds that petitioners lacked standing and that the complaint failed to state a claim upon which relief could be granted (Pet. App. Exh. A, pp. 34a-46a). The court of appeals, although disagreeing in part on the standing question, affirmed, holding the claim non-justiciable (Pet. App. Exh. B, pp. 47a-55a).

The essential facts are not disputed. Southern Rhodesia declared its independence from Great Britain in 1965. Thereafter, in December 1966, the Security Council of the United Nations, with the affirmative vote of the United States, adopted Resolution 232 declaring "that the present situation in Southern Rhodesia constitutes a threat to international peace and security * * *" and directing all member states to impose an embargo on trade with that country. In 1968, the Security Council reaffirmed its position in Resolution 253, calling for additional economic sanctions against the government of Southern Rhodesia. The President of the United States, acting under the United Nations Participation Act of 1945, as amended, 22 U.S.C. 287c, issued two Executive Orders, Nos. 11322 (3 C.F.R. (1967 ed.) 243) and 11419 (3 C.F.R. (1968 ed.) 125), implementing the embargo in this country.[3]

As a result of this action, the United States had to rely on the Soviet Union, rather than Southern Rhodesia, as its principal supplier of metallurgical chromite, a material not produced in the United States. In 1971,

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[3]Primary responsibility for enforcing the embargo was delegated to the Treasury Department; it issued regulations forbidding the importation of Rhodesian materials without a license. 31 C.F.R. (1968 ed.) 525, *et seq.* These regulations were replaced in 1968 by 31 C.F.R. (1969 ed.) 530, *et seq.* Following the Byrd Amendment, the licensing provisions were revised to permit the importation of "strategic and critical" materials. 31 C.F.R. 530.518, 37 Fed. Reg. 1108.

Senator Harry F. Byrd, Jr., introduced legislation which, in his words (117 Cong. Rec. 8344), was " * * * aimed at ending the dependence of the United State upon the Soviet Union for its supply of chrome ore * * * [by providing that] the President could not ban imports of a strategic material from a free world country if the importation of the same material is permitted from a Communist-dominated country."

The Byrd bill was hotly contested in both the House and the Senate.[4] It was finally adopted by Congress as an amendment to the Strategic and Critical Materials Stock Piling Act (50 U.S.C. 98-98h), and was signed by the President on November 17, 1971. As enacted, the Byrd Amendment provides in relevant part:

> Sec. 10. Notwithstanding any other provision of law, on and after January 1, 1972, the President may not prohibit or regulate the importation into the United States of any material determined to be strategic and critical pursuant to the provisions of this Act, if such material is the product of any foreign country or area not listed as a Communist-dominated country or area * * *, for so long as the importation into the United States of material of that kind which is the product of such Communist-dominated countries or areas is not prohibited by any provision of law.

As a result of this legislation, the President directed that the Treasury Department "take the necessary action to permit the importation of strategic and critical materials of Rhodesian origin, as called for by the Byrd Amend-

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[4]See the discussion of the legislative history of the Byrd Amendment set forth in Appendix A (pp. 1a-22a) to the Brief in Opposition of respondent Union Carbide ("U.C. Br. in Opp.").

ment" (see U.C. Br. in Opp., App. B, p. 23a). On January 24, 1972, the Rhodesian Sanctions Regulations were amended to permit issuance of a "General License" for the importation of strategic and critical materials, including metallurgical chromite, from Southern Rhodesia. Such a license was thereafter granted to respondent Union Carbide and to Foote Mineral Company for the importation of chromite, and both companies imported a quantity of this material into the United States. On April 19, 1972, petitioners commenced the present action.

In this Court, as below, petitioners have narrowed the focus of their attack to the regulations promulgated by the President to implement the Byrd Amendment. Their contention is essentially that the Amendment should be construed in a manner that would not authorize the President to devise licensing regulations with respect to the importation of "strategic and critical" materials from Southern Rhodesia. This argument was fully considered and rejected by the court below. The legislative history of the Byrd Amendment (U.C. Br. in Opp. 1a-22a) makes it abundantly clear that Congress intended by this legislation to "end the embargo against importation of chrome from Southern Rhodesia" (*id.* at 10a).

That the President implemented that unambiguous congressional directive through a "General License" regulation, rather than through one of the alternative approaches urged by petitioners (see footnote at Pet. 19), was a legitimate exercise of his constitutional responsibility to execute the power vested in him by the Byrd Amendment. For the reasons stated in the thorough opinion of the court of appeals, on which we essentially

rely here,[5] we agree with the conclusion below (Pet. App. 54a) that "[t]o attempt to decide whether the President chose properly among the * * * alternatives confronting him 'would be not to decide a judicial controversy, but to assume a position of authority over the governmental acts of another and co-equal department, an authority which plainly [the courts] do not possess.' *Frothingham* v. *Mellon*, 262 U.S. 447, 489 * * *." And see *Powell* v. *McCormack*, 395 U.S. 486, 518-519.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ERWIN N. GRISWOLD,
Solicitor General.

MARCH 1973.

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[5] While we disagree with the court of appeals' disposition of the standing question (Pet. App. 49a-52a), and agree with the district court on this point (Pet. App. 38a-44a), there is no need for the Court to consider whether these petitioners have standing, if it agrees that the decision below is correct on the issue of justiciability. In neither event is there a case or controversy within the Constitution's grant of the judicial Power.